No. 20416

United States Court of Appeals

FOR THE NINTH CIRCUIT

DRAGOR SHIPPING CORPORATION, a corporation, formerly WARD INDUSTRIES CORPORATION,

Appellant.

vs.

UNION TANK CAR COMPANY, a corporation,

Appellee.

REPLY BRIEF OF APPELLANT, DRAGOR SHIPPING CORPORATION

Upon Appeal from the District Court of the United States for the District of Arizona

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The Position of Union Upon This Appeal

In its brief upon this appeal (pp. 9-10, 13), Union has virtually conceded the established universality of the rule of law set forth in Dragor's opening brief (pp. 15-19) that a settlement and compromise constitutes "a new and superior contract *superseding and extinguishing* the contract or contracts upon which the original action between the parties was based, *and the action itself.*" * (*Moers* v. *Moers,* 229 N. Y. 294, 300). Necessarily, therefore, upon the execution and delivery of the settlement agreement and promissory note in New York on October 3, 1963, "the old causes of action were terminated. A new liability was substituted therefor." (*Yonkers Fur Dressing Co.*

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* Unless otherwise noted, all italics will be ours.

v. *Royal Insurance Company,* 247 N. Y. 435, 444, 446.) With regard to the existing lawsuits thus settled and compromised, "it was as if they had never been begun." (*Yonkers Fur Dressing Co.* v. *Royal Insurance Co., supra,* 444, 446). "The compromise agreement becomes the *sole source and measure* of the rights of the parties involved in the previously existing controversy." (*Wilson* v. *Bogert,* 81 Idaho 535, 347 Pac. 341, 345).

As an indispensable corollary to these rules of law, it is clear that the situs of the actions thus extinguished, "as if they had never been begun", cannot possibly constitute the constitutional basis for the assumption of the jurisdiction over a non-resident upon the superseding obligation by any State other than the State where that new obligation was created and allegedly breached. Recognizing the patent applicability of these rules of law, Union has virtually abandoned upon this appeal the arguments with which it urged the District Court below to assume jurisdiction over the person of Dragor in this case. In their place, for the very first time, Union presents, and bases its entire brief upon, brand new arguments in its attempt to sustain the unconstitutional assumption of jurisdiction *in personam* over Dragor in this case.

Those newly devised contentions are twofold in number. Not only are they completely contradicted by the incontrovertible facts contained in this record, including the very documents executed and delivered by and between the parties in New York on October 3, 1963, but each is mutually destructive of the other. Briefly summarized, Dragor's new position is as follows:

1. That "the settlement agreement provided for the dismissal of the Arizona suits as a *condition* to the delivery of the promissory note here in suit" (Union's Brief, p. 9); that the promissory note upon which Union sues *"did not become effective* until the Arizona suits were dismissed (Union's Brief, p. 8); and that "it was *only after* the suits were

dismissed that Union had a valid obligation" (Union's Brief, p. 15); and

2. That *the consideration* for the execution and delivery of Dragor's promissory note "was the dismissal of the Tucson suits" (Union's Brief, p. 14); that the dismissal "was an act *done by Ward* (Dragor) in Arizona" (Union's Brief, p. 11); and that it allegedly "occurred in Arizona *at a time subsequent* to the execution of the settlement documents in the State of New York." (Union's Brief, p. 18).

Thus, on the one hand, Union argues that the routine and ministerial act of filing stipulations of discontinuance in the Arizona suits was a *condition precedent* to the immediately binding effect of the promissory note and settlement documents in suit and, on the other, that the act of filing was "*subsequent* and took place in Arizona *after and not prior* to the execution of the settlement documents in the State of New York." (Union's Brief, p. 18).

Each of these mutually contradictory and self-destructive contentions will now be considered in turn. We shall demonstrate that each is based upon an indefensible disregard of the record, and that neither can justify the District Court's assumption of jurisdiction over the person of Dragor in this action instituted against Dragor upon the promissory note and settlement agreement which it made, executed, delivered and allegedly breached in the State of New York.

I

The Promissory Note and Settlement Agreement, as well as the other documents required thereunder, were all unconditionally executed and delivered by and between the parties in the State of New York on October 3, 1963 and immediately became effective on that day as binding and subsisting New York obligations.

Union's present thesis is expressed in the following extracts from its brief:

On page 4, it is stated that "the delivery of the aforesaid promissory note for $1,000,000.00 (executed and delivered by Dragor to Union on October 3, 1963) was *conditioned* upon the dismissal of said suits (in Arizona) and upon execution of the settlement agreement." (Matter in parentheses ours).

At page 8, it is stated that "under the settlement agreement the obligation upon which this suit was brought *did not become effective* until the Arizona suits were dismissed."

At page 9, it is stated that "as we have already pointed out, the settlement agreement provided for the dismissal of the Arizona suits *as a condition to the delivery of the promissory note here in suit.*"

At page 14, it is stated *"nor was the note sued on herein a valid obligation* under the express terms of the New York contract of settlement *until these suits were dismissed with prejudice.*"

At page 14, it is stated that "it was *only after the suits were dismissed* that Union had a valid obligation."

At page 19, it is stated that "the obligation sued on here *could not and did not arise until the Arizona cases were dismissed.*"

In summary, then, it is clear that Union is now contending that the Promissory Note and Agreement of Settlement, as well as the other documents required thereunder, all of which were simultaneously executed and delivered by and between the parties in the State of New York on October 3, 1963, were not, in fact, delivered and did not, in fact, become immediately binding and effective until, as a condition precedent thereto, the stipulations of discontinuance were filed in the Arizona suits.

The quoted assertions with which Union has filled its brief are based upon a total disregard of the record. To the exact contrary, all of the documents executed and delivered in New York on October 3, 1963 became *by their terms* immediately binding and effective on that day. Not a single one of these instruments remained undelivered on that day. Not a single one of these documents was placed in escrow on that day to await the occurrence of any other event. Not a single word is contained anywhere in the record, either in the documents executed and delivered on that day, or in any other instrument of any kind, nature or description, which directly or indirectly, expressly or impliedly, even remotely hinted or suggested that the promissory note and settlement agreement were not to become immediately binding and effective as valid and subsisting obligations until the purely ministerial and perfunctory act of filing the stipulations of discontinuance in Arizona and California had taken place.

The documents themselves speak more eloquently and conclusively upon this subject than any words which counsel can utter. What do those documents say?

(1) The Promissory Note: The promissory note upon which Union has based Count II of its complaint (R., pp. 10-11), executed and delivered by Dragor to Union in New York on October 3, 1963, specifically provides:

> "Ward Industries Corporation, a corporation, for value received, *hereby* promises to pay to Union Tank Car Company, a corporation, on September 30, 1964, the sum of $1,000,000 with interest . . .
>
> The amount due under this note is subject to reduction by any amounts due Ward Industries Corporation from Union Tank Car Company *under an agreement between the said parties dated this date,* a copy of which is attached hereto as Exhibit 'A' ".

With respect to that instrument, the plaintiff alleged, under the signature of its present counsel, that (R., p. 3):

> *"On October 3, 1963 the defendant,* whose corporate name was then Ward Industries Corporation, for a valuable consideration, *made, executed and delivered a promissory note,* a copy of which is annexed hereto as Exhibit B, ..."

(2) The Agreement of Settlement: The Agreement of Settlement, executed and delivered by both Union and Dragor on October 3, 1963, upon which the plaintiff has based Count I of its complaint (R. pp. 2-3), recites in the very first paragraph thereof that it was *"made* this 3rd day of October, 1963" (R. p. 5). Paragraph 1 reads as follows (R. p. 6):

> "Union and Ward *hereby mutually release each other* from any and all actions and claims, regardless of the nature or description thereof, and whether or not now known, excepting solely and only those actions or claims specifically set forth in this agreement."

Paragraph 5 reads as follows (R. p. 7):

> "Ward *shall pay to* Union on or before September 30, 1964 the sum of One Million ($1,000,000.00) Dollars. . . .

Paragraph 6 reads as follows (R. p. 8):

> "*A guarantee* by Mr. Jakob Isbrandtsen of the foregoing note and obligation of WARD in the form attached hereto as Exhibit 'A' *shall be delivered simultaneously upon execution of this agreement.*"

(3) Assignment: Paragraph 4 of the Agreement of Settlement required Dragor "to assign to WILLIAM B. BROWDER" Union's General Counsel, its claims against Union, The Fluor Corporation, Ltd. and the United States Government (R. p. 7). Such an assignment was duly executed and delivered by Union to Dragor on October 3, 1963 in the State of New York, the instrument reciting in part as follows (R. p. 109):

> "For good and valuable consideration, *receipt of which is hereby acknowledged,* the undersigned does *hereby* assign to WILLIAM B. BROWDER, an individual, all of the undersigned's right, title and interest to any and all claims which it has or may have against Union Tank Car Company and/or THE FLUOR CORPORATION and/or the United States Government . . ."

(4) Covenant Not To Sue: Simultaneously also with the execution of these documents, the parties executed and delivered a "Covenant Not To Sue", which reads as follows (R., pp. 26-27; 107-108):

> "In consideration of the execution of an Agreement of Settlement between UNION TANK CAR COMPANY (hereinafter referred to as 'Union') and WARD INDUSTRIES CORPORATION (hereinafter referred to as 'Ward'), *on this date,* and notwithstanding Paragraph '2' of the aforesaid Agreement of Settlement, Union and Ward *hereby* agree:
>
> 1. Neither Union nor Ward shall assert a claim against the other in connection with the action entitled 'United States of America for the use and benefit of

> Mosher Steel Company, and Mosher Steel Company, Plaintiffs, against The Fluor Corporation, Ltd., et al, Defendants', No. Civ. 1605-Tucson, or in any action which may result from a claim asserted by Mosher Steel Company against Union or Ward, and in the event that a judgment shall be rendered in the aforesaid action, or any other action instituted by the Mosher Steel Company against Union or Ward, neither party shall assert any rights to recover against the other as a result of such judgment. It is the intent of this paragraph that neither Ward nor Union shall pursue the other in connection with any claims by Mosher Steel Company against Union or Ward." * * *

It is an eloquent commentary upon Union's recognition of its present indefensible position that it should have been compelled to resort to so easily demonstrable a disregard of the record. Moreover, we can find nowheres in Union's brief any legal support for the legal argument which it has based thereon, even assuming, *arguendo,* the accuracy of its factual assertions.

It will be instructive to test Union's reliance upon the act of filing the stipulations of discontinuance in Arizona, assuming it to be, *arguendo,* a condition precedent, by this Court's definitive analysis in *L. D. Reeder Contractors of Arizona* v. *Higgins Industries,* 265 F. (2d) 768 of the due process requirements for jurisdiction *in personam.*

In reviewing *Hanson* v. *Denckla,* 357 U. S. 235, this Court in *L. D. Reeder* noted: (1) that the settlor of the Delaware trust subsequently moved to Florida; (2) that there had been correspondence between the Delaware trustee and the settlor in Florida; (3) that income had been paid by the Delaware trustee to the settlor in Florida; and (4) that the settlor had exercised in Florida a power of appointment over the trust reserved to the settlor by the terms of the trust. None of these acts, singly or collectively, were suffi-

cient to support the *in personam* jurisdiction of the Florida courts over the Delaware trustee.

This Court observed that, under *Hanson* v. *Denckla*, *supra*, the act of the non-resident in the forum state, necessary to sustain its jurisdiction over his person, must be "essential" or substantial *and* "must give rise to or result in a cause of action within that forum state" (p 773). It thereupon concluded, and its conclusion is dispositive of this appeal, that the act upon which personal jurisdiction is sought to be based must have a *"double substantial connection"* with the forum: first, it must have "a substantial connection with the state", i.e., it must constitute a *substantial* business act or transaction "purposefully" performed in the forum state; and second, it must "have a *substantial* and, indeed, *direct* connection with the *cause of action sued upon;* i.e., *the cause of action arises* by reason of acts so connected" (p. 773). Consequently, it is only "when this *double* substantial connection exists" that "a single act or transaction may be the basis for jurisdiction over a non-resident defendant".

In the instant case, the act of filing the stipulations of discontinuance satisfies *neither* requisite of the "double substantial connection" with the forum state prescribed by this Court and the United States Supreme Court. Firstly, the filing was not a substantial business act or transaction. After the parties had unconditionally released each other in New York of "any and all actions and claims, regardless of the nature and description thereof . . ." (R., p. 6), the filing of a stipulation implementing that release, in Arizona, California and elsewhere, was a routine and ministerial entry upon the court files of the termination of a suit already and previously extinguished.

Secondly, the act of filing the stipulations did not have, and could not possibly have had, "a substantial" or "direct connection with the cause of action sued upon." The plaintiff's causes of action are based upon Dragor's alleged fail-

ure, in New York, to pay a promissory note which it executed and delivered in New York. The act of filing had nothing whatsoever to do with, let alone "give rise to or result in", the causes of action set forth in the plaintiff's complaint. In the language of this Court in *Kourkene* v. *American BBR Inc.,* 313 Fed. (2d) 769, 773, speaking of some activities of the appellee in California, "Since it is clear that the appellant's cause of action did not arise out of or result from any of these activities", the District Court lacked jurisdiction *in personam.*

On December 15, 1965, the Circuit Court of Appeals for the Second Circuit rendered its decision in *Harvey* v. *Chemie Grunenthal,* N. Y. Law Journal, January 10, 1966, p. 1.* In that case, an action was brought in the United States District Court, Southern District of New York, by the plaintiff, who had purchased pills called "Contergan" in Germany which were manufactured and distributed by a German company. When she returned to this country, the plaintiff became pregnant, and, as a result of those pills, gave birth to deformed children, the pills containing Thalidomide, a highly toxic and especially dangerous element to infants in foetus. The action was brought in New York. The District Court dismissed the complaint for lack of jurisdiction *in personam.* In affirming the judgment of the Court below, the Circuit Court of Appeals rendered a comprehensive and definitive opinion upon the issue of jurisdiction *in personam* over non-residents. The following portion of its opinion is dispositive of the issues presented herein:

> "It is doubtful whether the scattered activity of Chemie Grunenthal in New York constitutes the transaction of business within the state. But even if we could hold that the engaging of a New York attorney, the conclusion of a product license agreement with a

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* The opinion of the Circuit Court has not yet been officially reported.

company with offices in New York City, and the shipment of samples through a New York port *constituted the transaction of business in New York*, the appellants would still fail to come within CPLR, section 302(a) (1), *for the appellants' cause of action was not one 'arising from' this business activity.*"

II

The filing of the stipulations in Arizona was not, as Union claims, "an act done by Ward in Arizona" (Union Brief, p. 11) which constituted "the consideration for the note sued on here" (Union Brief, p. 13).

It is claimed by Union that the consideration for Dragor's execution and delivery of the promissory note in suit "was the dismissal of the Tucson suits" (p. 14) and that such dismissal "was an act *done by Ward* in Arizona" (p. 11). We are thus presented with the unprecedented theory in contract law that the consideration for the execution and delivery of Dragor's promissory note was an act performed by Dragor itself; in short, that Dragor itself had furnished the consideration for its own promissory note. Union has apparently overlooked the elementary maxim of contract law that the consideration for a valid and enforceable promise must be furnished by the promisee, and not the promisor.

What were the several considerations furnished to Dragor in New York on October 3, 1963 by Union for Dragor's note? First, Union released Dragor and Dragor reciprocally released Union "of any and all actions and claims, regardless of the nature or description thereof and whether or not now known" (R., p. 6). Secondly, Union waived any right to claim over against Dragor in the Mosher suit then pending against both, with a reciprocal waiver by Dragor of its right to claim over against Union in that action. Thirdly, Union insisted upon receiving, and did

receive, an assignment of Dragor's claims under its subcontract which it agreed to prosecute with dispatch and credit Dragor with stipulated percentages of its recovery. Fourthly, to implement in part the general releases, both Union and Dragor executed stipulations of discontinuance in New York of the actions then pending in Arizona, California and elsewhere, which stipulations were thereafter filed in the Arizona and California Courts.

These, then, constituted the totality of the considerations furnished by Union to Dragor in the State of New York on October 3, 1963. The filing of the stipulations in Arizona, California and elsewhere took place, in Union's words *"after and not prior* to the execution of the settlement documents in the State of New York", (Union brief, p. 18). The act of filing was not a "substantial" business transaction at all. It was merely routine, ministerial and perfunctory, to record upon the files of the Courts the extinguishment of law suits which had already been effected by the general releases previously exchanged in New York. *No decision of any state or federal court has ever held, under any standard ever before applied, that the filing of such a stipulation constituted the transaction of business, substantial or otherwise, by a foreign corporation in a forum state.*

Moreover, the act of filing was completely unrelated to the cause of action upon the promissory note executed and delivered by Dragor in the State of New York. The settlement agreement executed in New York constituted *"the sole source and measure* of the rights of the parties involved in the previously existing controversy." (*Wilson* v. *Bogert,* 81 Idaho 535, 347 P. (2d) 341, 345). The total insufficiency of Union's argument that the filing of the stipulations in Arizona constituted, in some way, the constitutional nexus and support for the District Court's *in personam* jurisdiction over Dragor for its alleged default upon the promissory note is underscored by the following decisions:

In *Irgang* v. *Pelton & Crane Co.*, 42 Misc. (2d) 70, (N. Y. 1964) the defendant, a North Carolina corporation, was engaged in the manufacture and distribution of dental equipment and supplies. By a North Carolina contract, the plaintiff agreed to assign to the defendant her rights to certain trade names, trademarks and patents, in return for certain royalties. *The plaintiff executed the documents assigning her trade name, trademark and patent rights to the defendant in New York.* Upon the defendant's failure to pay the royalties, the plaintiff commenced an action in New York. In spite of the fact that the plaintiff had executed the documents assigning her trade name, trademark and patent rights to the defendant in New York, the New York Court dismissed the action upon the ground that it did not possess any *in personam* jurisdiction over the North Carolina corporation. It emphasized the fact that the plaintiff's cause of action did not relate to or arise out of the execution of the assignment in New York, and that the assignment documents had been signed in New York *to fulfill the requirements of the contract previously executed in North Carolina.* The Court held (p. 73):

> "Plaintiff did sign the documents of assignment of her trade name and mark and her patent rights to defendant in New York, *but these did not constitute another contract;* these documents were signed *to fulfill the requirements of the contract previously executed in North Carolina,* and the cause of action herein is for *the alleged breach of that North Carolina contract.*"

In *Erlanger Mills, Inc.* v. *Cohoes Fibre Mills, Inc.*, 239 F. (2d) 502, Erlanger, a North Carolina corporation, entered into an agreement in New York to purchase a quantity of synthetic yarn from the defendant, a New York corporation. The defendant shipped the goods to Erlanger in North Carolina. Erlanger paid therefor with a check from North Carolina. It then discovered alleged defects in the

goods when it attempted to process those goods in North Carolina. It thereupon brought a suit in the North Carolina State Court to recover for the alleged defects in the goods. The action was removed to the North Carolina Federal District Court, where service was quashed upon the ground that the North Carolina did not possess jurisdiction *in personam* over the defendant company. In spite of the fact that the goods had been shipped by the defendant into North Carolina, that they had been paid for in North Carolina and that the defects in the goods became only apparent in North Carolina, the Circuit Court of Appeals for the Fourth Circuit, in affirming a dismissal of the complaint, declared: (p. 507)

> "We cannot shut our eyes to the disorder and unfairness likely to follow from sustaining jurisdiction in a case like this. It might require corporations from coast to coast having the most indirect, casual and tenuous connection with a State to answer frivolous law suits in its courts. To permit this could seriously impair the guarantees which due process seeks to secure."

If, as in the *Irgang* case, *supra,* the plaintiff's execution of the assignment in New York of her trade name, trademark and patent rights was not sufficient to constitute a constitutional nexus with the forum state; and if, as in the *Erlanger* case, *supra,* the receipt of the goods in North Carolina and the payment therefor in North Carolina were equally insufficient to furnish that constitutional nexus, then *a fortiori,* the filing of a stipulation of discontinuance which, as the New York Court noted, was filed *"to fulfill the requirements of the contract previously executed",* could not possibly support an *in personam* jurisdiction of the Arizona District Court.

III

No other argument advanced or authorities cited by Union can support the decision of the court below.

(1) We now turn to a consideration of the miscellaneous assertions and arguments presented by Union in its behalf, none of which can furnish the slightest support for the judgment appealed from. Thus, we are told that "the settlement of said suits was only concluded after changes had been made in the settlement proposal by affiant (Thomas C. McConnell, Union's Chicago attorney) here in Arizona . . ." (Union Brief, pp. 10-11). The contemplation by *Union's attorney* of the proposed settlement in Arizona, and his Arizona thoughts thereon, can hardly furnish a constitutional basis under the due process clause for Arizona's assumption of an *in personam* jurisdiction over a non-resident defendant. The requirements of our Federal Constitution can hardly hinge upon the place where *Union's counsel* engaged in cerebration.

(2) Throughout the course of its brief, Union has persistently charged, without a shred or scintilla of supporting proof, that "Dragor defaulted" in the performance of the original subcontract (p. 1); that it "failed to complete the subcontract" (p. 3); that Union "was forced to complete the same at an excess cost of approximately $9,000,000 (p. 3); and finally, that Dragor withdrew from Arizona "after its default in the performance of its subcontract with Union" (p. 24). It is also stated that Dragor "did not deceive the District Court and will likewise not mislead this Court" (p. 20).

These assertions are deliberately designed to prejudice the appellant in the eyes of this Court. They have no place upon this appeal. The execution of the settlement agreement, as Union should now know, does not constitute, and cannot possibly constitute, evidence of any "default" or an admission thereof. It represents, solely, "a desire to avoid or seek a surcease of litigation on the part of the defend-

ant . . ." (*Quillen* v. *Board of Education,* 203 Misc. 323 [N. Y.]).

(3) We are told by Union in its brief that the New York decisions, particularly *Longines-Wittnauer* v. *Barnes and Reinecke,* 15 N. Y. (2d) 443, are contrary to Dragor's position herein (p. 16). Union has completely misread that New York decision. It represented a consolidation, on appeal, of three cases: one, a contract action and two tort suits.

In the contract action, a suit was brought by Longines-Wittnauer against Barnes and Reinecke for breach of warranty in the manufacture and sale of machines especially designed for the plaintiff New York corporation by the defendant Illinois company. The following acts were established: (1) The preliminary contract negotiations were conducted in New York over a period of two months; (2) The contract itself, though signed in Chicago, contained an express provision that it was "a contract made in the State of New York and governed by the laws thereof"; (3) Discussions concerning performance took place in New York; (4) A supplemental contract was executed in New York; and (5) The machines were delivered to the plaintiff's plant in New York and were there installed and tested over a period of three months by the defendant's top engineers. The New York Court of Appeals concluded, in view of this overwhelming factual proof, that the defendant was subject to the *in personam* jurisdiction of the New York Courts.

In one tort action, *Feathers* v. *McLucas,* a steel tank, defectively manufactured by the defendant in Kansas, was eventually sold to a Pennsylvania corporation and exploded in New York, injuring the plaintiff. The Court held that the defendant manufacturer was *not* subject to the *in personam* jurisdiction of the New York Courts.

In the second tort action, *Singer* v. *Walker,* a geologist's hammer manufactured in Illinois was sold by the Illinois manufacturer to a dealer in New York. The hammer pur-

chased from the dealer in New York split when used in Connecticut, injuring the plaintiff. The *in personam* jurisdiction of the New York Courts was sustained, not because of the single transaction described, but only because the Illinois manufacturer "had shipped substantial quantities of its products into this state as the result of solicitation here through a local manufacturer's representative and through catalogues and advertisements" (p. 466). As a result, the Court held that the defendant was actually engaged in the general transaction of business within the State of New York (p. 467).

Union attempts to distinguish *Boas* v. *Vernier*, 22 A. D. (2d) 561, upon the ground that the defendant in that case did not perform any act "with respect to the oral agreement in New York". What Union has completely overlooked, however, is that the plaintiff was originally employed under a written agreement delivered and executed in New York. The written agreement was subsequently superseded by an oral agreement in France. Necessarily, then, the plaintiff surrendered his New York rights under the New York contract. The New York Court squarely held that the execution of the New York contract, and the extinguishment of the plaintiff's rights thereunder upon the consummation of the oral contract, did not subject the defendant to the *in personam* jurisdiction of the New York Courts in a suit upon the superseding oral contract concluded in France. The decision is controlling and dispositive, particularly in its emphasis upon the fact, so apposite herein, that: "The fact that a prior written agreement was historically necessary to the inception of the subsequent oral agreement does not alone, for purposes of the jurisdiction statute support personal jurisdiction" (p. 563).

4. Union has referred (p. 7) to Dragor's refusal to appear for the trial of its counterclaim which was then dismissed for lack of prosecution. Although that matter has no conceivable relevancy to the issues presented by this appeal, it is important, in view of Union's reference, that the Court be fully apprised of the pertinent facts.

From the very institution of this lawsuit, Dragor has vehemently contested the *in personam* jurisdiction of the District Court. After its motion to quash was denied, it moved, under 28 U. S. C. A., §1292, subs. (b), for leave to appeal to this Court. The District Court denied that motion, in spite of Dragor's concern that its right to contest the *in personam* jurisdiction of the District Court might be jeopardized if it were compelled, involuntarily, to interpose a compulsory counterclaim in this action. At that time, Union insisted that the forced interposition of a compulsory counterclaim could not possibly jeopardize Dragor's right to challenge the *in personam* jurisdiction of the District Court. Still concerned, Dragor sought a writ of prohibition from this Court. Union repeated its arguments below, that Dragor could not possibly jeopardize its jurisdictional objection by the involuntary interposition of a compulsory counterclaim. The application for a writ was thereupon denied.

Subsequently, Union brought an action in the Connecticut District Court against Isbrandtsen upon his guarantee; Isbrandtsen claimed over against Dragor; and Dragor filed its counterclaim against Union.

Since all three parties—Union, Dragor and Isbrandtsen—were properly before the Connecticut District Court, and there was no cloud upon its jurisdiction, Dragor thereupon moved in this action, under Rule 41(a)(2) of the Federal Rules, for leave to discontinue the counterclaim without prejudice (since the judgment appealed from herein had already been entered by the District Court) upon the ground, among other things, that the jurisdiction of the District Court was the subject of this appeal pending in this Court, and that, should Dragor's position upon its appeal be sustained, all of the proceedings in the District Court would be annulled, resulting in an intolerable waste of time and effort and an enormous expense to Dragor. Before the argument for leave to discontinue was even commenced, the District Court announced that, even

if this Court reversed the judgment appealed from herein, Dragor's involuntary interposition of a compulsory counterclaim had conferred upon it, and it intended to exercise, jurisdiction to try the same. In view of the directly contrary arguments and rulings preceding the interposition of the counterclaim, the Court's announcement came as a shock to Dragor. The District Court denied Dragor's motion for leave to discontinue without prejudice.

As a result, Dragor became convinced that any further participation by it in the proceedings before the District Court might impair its claim that the District Court never acquired jurisdiction over the person of Dragor either by the service of process or by its involuntary interposition of a compulsory counterclaim. Consequently, it refused to proceed any further, confident that its position would be sustained upon appeal. An appeal has been taken from the District Court's action in dismissing the counterclaim with prejudice and will be heard by this Court in due course.

5. We are told by Union (p. 24) that "even if only a single transaction was here involved", the decisions which Dragor has cited herein, both of the United States Supreme Court and this Court, are distinguishable because the corporations involved (in those cases) had never been licensed in the forum state. In essence, then, it is Union's position that, once a corporation has been qualified to do business in a foreign state, and thereafter formally withdraws from that state in accordance with its laws, it is nevertheless forever subject to the *in personam* jurisdiction of that state, even if it never afterwards performs a single act which possesses, in the language of this Court in *L. D. Reeder, supra,* "a double substantial connection" with such state. The argument is totally fallacious. It has been rejected out-of-hand by innumerable decisions. (*Confidential, Inc.* v. *Superior Court,* 157 Cal. App. (2nd) 75, 320 Pac. (2nd) 546; *Hexter* v. *Day-Elder Motors Corp.,* 192 App. Div. 394, 182 N. Y. Supp. 717).

CONCLUSION

Because of the immense importance of this case to Dragor and its several thousand public stockholders throughout the United States, we have sought to analyze, with great care, every argument and decision advanced by Union upon this appeal, an analysis which we are convinced has established a total lack of any basis whatsoever for the attempted assumption of *in personam* jurisdiction by the Court below. Unless this Court is prepared to eliminate the due process mandate of the Constitution in its entirety, and substitute therefor the pot pourri of factual and legal misstatements and litigious animus offered by Union herein, the judgment of the District Court must be reversed. The words of Judge Sobeloff sound a warning which cannot be ignored:

> "If jurisdiction were sustained on such slight strands the maze of interstate lawsuits growing out of the heavy volume of interstate commerce in this country could bring intolerable turmoil to the administration of justice". (Sobeloff, Non-Residence In Our Federal System, 43 Cornell Law Quarterly, 196, 205).

It is respectfully submitted that the judgment appealed from be reversed, the plaintiff's complaint dismissed, and all proceedings had in this cause before the District Court of Arizona annulled in all respects.

Respectfully submitted,

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Dragor Shipping Corporation

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Certificate of Compliance

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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